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IN THE

Supreme Court of the United States

October Term, 1953

No. .....

V. S. ANDERSON, and M. C. ANDERSON, copartners doing business as PACIFIC MOULDED PRODUCTS COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Petitioners herein, V. S. Anderson and M. C. Anderson, copartners doing business as Pacific Moulded Products Company, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, enforcing an order of the National Labor Relations Board.

Jurisdiction.

Respondent petitioned the United States Court of Appeals for the Ninth Circuit for the enforcement of its order against Petitioners, pursuant to the provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C., Supp. IV, Sec. 141, *et seq.*, hereinafter called "the Act," an Act of Congress regulating interstate commerce.

Judgment of the United States Court of Appeals was entered on September 2, 1953. The case is reported at 206 F. 2d 409.

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code, 28 U. S. C., Supp. IV, and Rule 38, subsection 5(b) of the Revised Rules of the Supreme Court of the United States.

Statutes Involved.

The statute involved is the Labor-Management Relations Act of 1947, 29 U. S. C., Supp. IV, Section 141 *et seq.*, which amends the National Labor Relations Act, and prescribes the rights and duties of employees, labor organizations and employers in their relations affecting commerce. Petitioner asks leave to refrain from reprinting at this point the numerous provisions of the Act which bear on the argument on the merits.

Statement of the Case.

Petitioners maintain their principal office and place of business at Los Angeles, California, where they are engaged in the manufacture and sale of moulded rubber products. Petitioners admit that they are engaged in commerce within the meaning of the Act.

Organizational activities among the approximately seventy employees of Petitioners were commenced by the United Rubber, Cork, Linoleum and Plastic Workers of America, CIO herein called "the Union," through its organizer, Herbert Welch, in November, 1950. Union activity inside the plant was largely carried on by employee Harold Kimball, the union organizer, by his own admission. On November 24, 1950, the Union wrote to Petitioners and requested recognition as the collective

bargaining representative for the plant. Petitioners replied on the same date, stating that there had been no proof of majority and that the National Labor Relations Board should handle the matter. The Union immediately filed a petition for certification of representatives in a production and maintenance unit. An election was held on February 20, 1951. Of the seventy-two eligible voters, sixty-seven cast ballots, twenty-eight in favor of the Union and thirty-nine opposed.

Objections were filed by the Union, and, after investigation, Respondent set aside the election and ordered a second election which was thereafter held on June 19, 1951. The record does not supply the results of the second election.

Respondent issued a complaint against Petitioners dated June 8, 1951, based upon a charge and amended charge filed by the Union on February 26, 1951, and April 26, 1951, respectively. These charges were based on conduct in connection with the first election. No charge or complaint issued based on the second election. The complaint alleged that during the Union's organizational campaign, Petitioners had committed unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act, as amended.

After the usual Board proceedings, and with relation to the first election only, Respondent found Petitioners guilty of, and ordered Petitioners to cease and desist from, doing the following things:

> (a) Threatening to close their plant before they would recognize United Rubber, Cork, Linoleum and Plastic Workers of America, CIO, or any other organization;

(b) Threatening to deprive their employees of overtime work if United Rubber, Cork, Linoleum and Plastic Workers of America, CIO, or any other labor organization is selected as the bargaining representative of their employees;

(c) Interrogating employees concerning their votes in a Board-conducted election;

(d) Instigating the formation of a company union;

(e) Promising better treatment and granting wage increases in return for anti-union votes in a Board-conducted election;

(f) Falsely attributing responsibility for the withholding of bonus payments from employees to United Rubber, Cork, Linoleum and Plastic Workers of America, CIO, or any other labor organization;

(g) Falsely accusing United Rubber, Cork, Linoleum and Plastic Workers of America, CIO, or any other labor organization of trying to cheat employees of their withheld bonus;

(h) Falsely attributing to the National Labor Relations Board an order reducing wages or eliminating a prior wage increase if the employees vote in a Board-conducted election in favor of United Rubber, Cork, Linoleum and Plastic Workers of America, CIO, or any other labor organization; and

(i) In any other manner interfering with, restraining, and coercing their employees in the exercise of their Section 7 rights.

Respondent petitioned the Ninth Circuit Court for enforcement of its order, and on September 2, 1953, the Court entered a decree enforcing the Board's order as prayed.

Petitioners have set out in their Brief, *infra*, with page references, all of the evidence in the record relating to each issue raised by this Petition. To avoid duplication in the recitation of facts, Petitioners ask leave to incorporate this material by reference thereto.

Statement of Questions Presented.

Does substantial evidence on the record considered as a whole support the Board's finding that Petitioners threatened to deprive their employees of overtime work if the Union was selected as the bargaining representative?

Was Petitioners' statement that the Union was opposed to overtime work and Petitioners' prediction that if the Union came into the plant the employees would lose their overtime pay, an expression of opinion protected by the free speech guarantee of the Act?

Does substantial evidence on the record considered as a whole support the Board's finding that Petitioners instigated the formation of a company union?

Was Petitioners' statement that they had been in plants that had company unions and that they had proved to be satisfactory an expression of opinion protected by the free speech guarantee of the Act?

Does substantial evidence on the record considered as a whole support the Board's finding that Petitioners falsely attributed responsibility to the Union for the withholding of bonus payments from Petitioners' employees and that Petitioners falsely accused the Union of trying to cheat the employees of their withheld bonuses?

Were Petitioners' statements attributing responsibility to the Union for the withholding of bonus payments to

employees expressions of opinion protected by the free speech guarantee of the Act?

Does substantial evidence on the record considered as a whole support the Board's finding that Petitioners interrogated an employee concerning his vote in a pending election?

Is interrogation of an employee concerning his vote in a pending election protected by the free speech guarantee of the Act where such interrogation does not include threats of force, economic reprisal or promise of benefit?

Does substantial evidence on the record considered as a whole support the Board's finding that Petitioners threatened to close their plant before they would recognize the Union?

Was Petitioners' prediction that Respondent would make an order eliminating a prior wage increase an expression of opinion protected by the free speech guarantee of the Act?

Does substantial evidence on the record considered as a whole support the Board's finding that Petitioners promised better treatment and wage increases in return for anti-union votes?

Reasons Relied Upon for Granting of Writ.

1. The power of the Supreme Court to grant a Writ of Certiorari is invoked pursuant to Rule 38, Subsection 5(b) of the Revised Rules of the Supreme Court of the United States in that the Ninth Circuit Court of Appeals has decided important questions of federal law which have not been, but should be, settled by the Supreme Court of the United States, and to permit such settlement by the Supreme Court, the Writ should be granted.

2. The power of the Supreme Court to grant a Writ of Certiorari is invoked pursuant to Rule 38, Subsection 5(b) of the Revised Rules of the Supreme Court of the United Ctates in that the Ninth Circuit Court of Appeals has decided important questions of federal law in a way probably in conflict with applicable decisions of this Court, and the Second, Fourth, Sixth, Seventh and Eighth Circuit Courts of Appeals.

3. The Ninth Circuit Court in this case proceeded on the basis that because the Court was satisfied that, in some respects Petitioners violated the Section 7 rights of the employees, they would enforce the Board's order in all respects, even though Petitioners may not have violated the Act in all respects. This is made clear by the Ninth Circuit Court's statements in its opinion that "while it is arguable that some of Respondents' [Petitioners] statements are protected, others—incontrovertibly established—are clearly not." This Court has insisted that the Circuit Courts scrutinize with care all phases of the Board's order so that an employer is not obligated to publicly admit that it is guilty of acts which he has not committed or which are not unlawful. *May Dept. Stores v. N. L. R. B.*, 326 U. S. 376, 90 L. Ed. 145; *N. L. R. B. v. Express Pub. Co.*, 312 U. S. 426, 85 L. Ed. 930.

4. The Ninth Circuit Court has denied to Petitioners their constitutional right of free speech. In *N. L. R. B. v. Brown-Brockmeyer Company*, 143 F. 2d 537, the Sixth Circuit Court held that where an employer stated to his employees that the Union was responsible for the loss of overtime and the statement dealt with the facts of the controversy, the statement fell within the area of free discussion guaranteed by the Constitution. In the instant case the Ninth Circuit Court has held Petitioners guilty

of unfair labor practices for making virtually identical statements.

5. In *Wayside Press, Inc. v. N. L. R. B.*, 206 F. 2d 862, the Ninth Circuit Court itself held that an employer's affirmative urging of his employees to exercise their rights under the Act to organize an independent union is not a violation of the Act, yet in this case the Ninth Circuit Court holds Petitioners guilty for doing nothing more than stating that in their opinion company unions worked out satisfactorily.

6. Important questions concerning the extent to which employers are privileged to express their views on unionization under Section 8(c) of the Act are involved. These questions affect the constitutional rights of thousands of employers throughout the country and this Court should resolve with finality the uncertainty and conflict in the law which now exists.

Conclusion.

For the foregoing reasons, and for the reasons set forth in the Brief in support of this Petition presented herewith, Petitioners pray that this Petition be granted and that the aforesaid questions be determined by this Court upon the granting of a Writ of Certiorari herein.

Respectfully submitted,

CARL M. GOULD, for
HILL, FARRER & BURRILL,
Counsel for Petitioners.

Certificate of Counsel.

I, the undersigned, Carl M. Gould, Counsel for Petitioners herein, hereby certify that in my judgment and opinion the foregoing Petition for a Writ of Certiorari is well founded, and that it is not interposed for purpose of delay.

CARL M. GOULD.

IN THE

Supreme Court of the United States

October Term, 1953.

No. .....

V. S. ANDERSON, and M. C. ANDERSON, copartners doing business as PACIFIC MOULDED PRODUCTS COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

The statements in the Petition for Writ of Certiorari presented herewith with regard to the paragraphs entitled "Jurisdiction," "Statutes Involved," "Statement of the Case," and "Statement of Questions Presented," are incorporated by reference thereto. This case is reported at 206 F. 2d 409.

Summary of Argument.

Substantial evidence on the record considered as a whole does not support the Board's finding that *Petitioners* threatened to deprive their employees of overtime work if the union was selected as the bargaining representative. The record shows simply that Petitioners predicted that the union was opposed to overtime and that if the union came into the plant, the employees would lose their overtime pay. Such a statement is protected by the free-speech guarantee of the Act as Petitioners did not express or imply that they would use their economic position to make the prediction or prophecy come true.

Substantial evidence on the record considered as a whole does not support the Board's finding that Petitioners instigated the formation of a company union. The record reveals simply that Petitioners expressed the opinion that company unions in other plants had worked out satisfactorily. Such a statement is protected under the free-speech guarantee of the Act where it is not accompanied by threats or promise of benefit.

Substantial evidence on the record considered as a whole does not support the Board's finding that Petitioners *falsely* attributed responsibility to the union for the withholding of bonus payments. The truth or falsity of the statements was not an issue in this case. In any event, the statements are protected by the free-speech guarantee of the Act, since free speech does not depend upon the accuracy of the ideas expressed, the statements deal with the facts of the controversy and were honestly made.

Substantial evidence on the record considered as a whole does not support the Board's finding that Petitioners interrogated an employee concerning his vote in an election. In any event, such interrogation is protected by the free-speech guarantee of the Act since standing alone and by its own express terms it did not threaten force, economic reprisal or promise of benefit.

Substantial evidence on the record considered as a whole does not support the Board's finding that Petitioners, before a group of employees, threatened to close their plant before they would recognize the union where one witness testified in support of the finding and five witnesses testified contrary to the finding of the Board.

Petitioners' prediction that the Board would make an order eliminating a prior wage increase was an expression of opinion protected by the free-speech guarantee of the Act, since, even if Petitioners were mistaken, free speech does not depend upon the accuracy of the ideas expressed.

Substantial evidence on the record considered as a whole does not support the Board's finding that Petitioners promised a wage increase in exchange for anti-union votes, since the wage increase was granted for the purpose of protecting the employees against a wage freeze, and it was in accord with a long established practice and policy of the company.

ARGUMENT.

I.

Substantial Evidence on the Record Considered as a Whole Does Not Support the Board's Finding That Petitioners Threatened to Deprive Their Employees of Overtime Work if the Union Was Selected as the Bargaining Representative.

Counsel for Petitioners have carefully searched the record for evidence supporting the finding that *Petitioners* threatened to deprive their employees of overtime work if they selected the union as their bargaining representative. The only evidence which remotely bears on such a finding is found at [R. 323] where witness Sawyer testified to the following:

> "Q. Now, did you have a conversation with Mr. Jefferson at that time? A. Yes, sir, I did.
>
> Q. Will you tell us in your own words, please, as near as you can recall, what he said to you and what you said to him? A. Well, Mr. Jefferson told me that the company had quite a few government orders, and in order to get these orders filled, the employees would have to work Saturday and Sunday. He said it would be Saturday at time and a half and Sunday at double time and if the union got in, the union doesn't approve of any overtime and they wouldn't be able to fill these government orders, and he said, 'You know, the girls use their own discretion about letting the union in,' and it would mean quite a loss of pay for them, they wouldn't get that time and a half and overtime on these orders, and he wouldn't be able to fill the orders without that time and a half overtime, without working Saturday and Sunday."

On cross-examination, witness Sawyer testified as follows [R. 340]:

> "Trial Examiner Bennett: Coming back to this question that he asked you if you were for or against the union, what reply, if any, did you make?
>
> The Witness: He didn't ask me that directly.
>
> Trial Examiner Bennett: What do you mean?
>
> The Witness: He went on telling about what the company had done and what they would do and how the union didn't want the overtime. He asked if I approved of overtime. He said to bear in mind how well the company used us and that they would use us even better if they won out in the election.
>
> Q. (By Mr. Gould): What words did he use? A. I don't remember exactly the exact wording." [R. 340.]

The only other possible support for the Board's finding that Petitioners threatened to deprive their employees of overtime is found in two letters which Petitioners disseminated to their employees [R. 29 and 51]. In the first letter Petitioners said:

> "Come next week, you will start working six days. A copper shortage was the reason for the last several 5-day weeks. The union doesn't like overtime, it wants a 5-day week. It wants to slow down production at any cost."

In the second letter Respondent said:

> "The Union doesn't like overtime. It wants a five-day week. Our National Defense demands full production which takes more time than five days a week. Do you want to cause a slow-down in our defense program? And do you want to give up your overtime as well?"

The only reference to the threatened loss of overtime in the Intermediate Report is at [R. 215] in the following words:

> "Jefferson told her that the Union opposed overtime work, that the loss of overtime would mean a substantial loss of pay, and that the girls should therefore use their discretion about having the Union represent them."

Upon this evidence the Board and the Ninth Circuit Court finds that *Petitioners* threatened the employees with a loss of overtime.

It is inconceivable to our minds how such fragmentary evidence can be found to constitute *a threat by Petitioners* to deprive the employees of overtime work. Not only is there not substantial evidence to support the Board's finding, there is *no evidence* to support the Board's finding that *Petitioners* threatened to deprive their employees of overtime work. For this reason, the Board's order on the point should be denied enforcement.

II.

Petitioners' Statements With Regard to Overtime Pay Were Expressions of Opinion Protected by the Free Speech Guaranty of the Act.

Taking the inferences from the testimony most favorable to the Board, *supra,* the letters to the employees and the statement attributed to Jefferson, Petitioners' labor relations consultant, constitute but an opinion of Petitioners that the union was opposed to overtime and that if the union came into the plant, the employees would lose their overtime pay. These expressions are nothing more than a well founded prediction, which the employees were entitled to hear and consider, and which Petitioners, under the free speech guaranty of Section 8 of the Act, were entitled to disseminate to their employees.

Such a prediction as Petitioners made does not constitute a threat so long as Petitioners do not express or imply that *they* will use their economic position to make the predictions or prophecy come true. *Mylan-Sparta Company, Inc.*, 78 NLRB 1144 (1948). In the *Mylan-Sparta Company* case, the Company published in local newspapers several statements about the probable effects of union organization of the company's plant, including the following excerpt:

> "Unions cause . . . strikes . . . when unions cause slow downs, wages go down. When unions strike, wages disappear. . . . Unions never gave anyone in White County a job. Our history shows that unions caused our people to lose jobs." (78 NLRB 1144, 1152.)

The Board, in reversing the Trial Examiner, said at 78 NLRB 1144, 1145:

> "A prophecy that unionization will ultimately lead to loss of employment is not coercive when there is no threat that the Respondent will use its economic power to make its prophecy come true."

Petitioners did not threaten to use their economic power to make the prophecy of loss of overtime come true. To the contrary, witness Sawyer's testimony at R. 323 shows the concern of Petitioners, from a business standpoint, at the prospect of not working Saturdays and Sundays. Witness Sawyer testified that Jefferson told her that in order to get the government orders filled, the employees would have to work overtime. As for the letters written to the employees, they show Petitioners' genuine concern at the prospect of any slowdown in production. None of

the evidence can be construed as a threat by *Petitioners* to put the plant on a five day week basis.

At R. 263, witness Jefferson, Petitioners' labor relations consultant, testified, as the basis for making the statement that the unions do not like overtime, as follows:

> "Q. Directing your attention to the paragraph entitled 'The Union Hates Overtime,' that, too, I assume is an expression of your opinion, Mr. Jefferson? A. That is right.
>
> Q. Upon what did you predicate it? A. Because none of the union shops were working overtime."

The truth or falsity of Petitioners' statement with regard to union attitude toward overtime is, of course, immaterial and not an issue in this case. As Board Member Murdock said, in dissenting on another issue in the instant case, these statements are "obvious campaign propaganda, the truth or falsity of which the Board will not police." [R. 231.] See also *N.L.R.B. v. J. L. Brandeis & Sons,* 145 F. 2d 556, 566, holding that free speech does not depend upon the accuracy of the ideas expressed.

For the reasons set forth herein, we submit that not only is there *no evidence* to support the Board's finding that Petitioners threatened to deprive their employees of overtime work, but that the statements were protected under the free speech guaranty since they contained no threat of economic reprisal by Petitioners. The Board's order on this point should be denied enforcement.

III.

Substantial Evidence on the Record Considered as a Whole Does Not Support the Board's Finding That Petitioners Instigated the Formation of a Company Union.

The Hearing Examiner and the Board found that both Petitioner Anderson and Jefferson suggested and instigated the formation of a company union. A reference to the testimony as to the part played by Petitioner Anderson in relation to the alleged formation of a company union shows the limits to which the Board will go in order to hold an employer.

Witness Sawyer testified at R. 320 that Petitioner Anderson told the girls that he wanted to make it comfortable for them, and that "he expected the girls to cooperate with him and if the girls would form a committee and appoint some of the girls to come to his office and discuss things with him that the girls weren't satisfied with, that he would be well pleased." (This is instigating the formation of a company union, says the Board.)

When asked what was done about a committee, witness Sawyer testified at R. 321 that "the committee was formed and the three girls with top seniority were asked to go into the office and speak to Mr. Anderson."

When asked what the committee discussed when they met with Petitioner Anderson, witness Sawyer testified at R. 322:

> "We asked Mr. Anderson about the 40 hour week and he said at that time that he wasn't able to put

it into effect right away, but that he was thinking of putting on a second shift, and as soon as he got the second shift organized he would put the 40 hour week into effect."

Witness Moses explained the purpose of the committee in the following manner at R. 388-389:

"Trial Examiner Bennett: What we want to know is when was it that that last statement was made, as well as you recall, the statement about forming a committee.

The Witness: Well, that was when they were talking about—when they were—when they decided they wanted the 40-hour week. He says it would be better for the girls to get together and come to him with—elect the one person to talk to him instead of all of us going into the office, why, just let one go in and do the talking for all of us.

* * * * * * * *

Q. How did this matter come up? A. About what?

Q. About this, Mr. Anderson saying it would be better if one of you came in. A. Well, when he was just talking about the conditions of work, working conditions, and he said if it was anything like the hours, you know, that he thought maybe it would be better if one came in and talked to him instead of all."

Petitioner Anderson denied that he at any time suggested to any of the employees that a company union be formed [R. 403, 456]. He also testified that he did not suggest the formation of a committee at any time [R. 454]. Petitioner Anderson testified that he told the girls that if a number of them wanted to come in to see him as a *group* that was all right with him [R. 453].

In essence, Sawyer, Moses and Anderson were referring to the same thing—a group or committee of the girls to talk over their grievances with Anderson. Neither employer nor employees had in mind what the Board has made out of this conversation, namely, the formation of a company union. Accepting the Board's view of the evidence, that Petitioner Anderson suggested the formation of a *committee* to present grievances to Petitioners, still there is nothing unlawful in making such a suggestion. Section 8(a)(2) of the Act provides that an employer shall not be prohibited from permitting employees to confer with him during working hours without loss in time and pay. In addition, under the Act, it is a guaranteed right of employees to present their grievances to their employer directly even where a union has been certified to represent the employees. Section 9(a) of the Act provides that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted as long as the bargaining representative has been given opportunity to be present at such a meeting. In the absence of any designated bargaining representative, of course, the employees and the employer have the right to set up their own grievance procedure within the plant. The Hearing Examiner and the Board concluded that because of the above statements of Petitioner Anderson, Petitioners have engaged in an illegal course of conduct, saying at R. 217:

> "Specifically included in this conclusion are the threats by Anderson . . . to close down the plant before he would recognize a union . . . and his suggestion that the employees form a company union."

We respectfully submit that this warped and irrational construction of Petitioner Anderson's statements, by a

disgruntled employee and by the Board, should not prevail and the order in support thereof should be denied enforcement.

Two witnesses testified on behalf of the Board in connection with Jefferson's statements in regard to the alleged formation of the union.

Witness Kimball, the union organizer, testified that Jefferson told a group of the third shift employees that a union election was about to take place and, in his opinion, the employees would be the better benefited to not vote in favor of the union—"that everything that the union were offering the employees, they either had or they had a piece of." [R. 299.] Witness Kimball testified that Jefferson went on to state "that there was some discussion in regard to a company union being formed and that he had been in plants that had company unions that were very satisfactory." According to Kimball, Jefferson told the employees to take his statement for what it was worth [R. 299].

Witness Vanderslice testified at R. 355 as follows:

> "Trial Examiner Bennett: Will you state for me again what Mr. Jefferson had to say about company unions?
>
> The Witness: He said he had been around to different places where company unions had worked out favorably, and well—there was talk of a company union being formed in Pacific Moulded Products.
>
> Trial Examiner Bennett: Did he leave it right there? You said something before about him finding it to be favorable.
>
> The Witness: Yes. He said in all the other companies he had been around to see that it had worked out very well."

That is the sum total of the evidence upon which the Board based its finding that Jefferson instigated the formation of a company union.

In considering the record as a whole, we have the testimony of three other employees who were present when the speech was made who testified that there was no mention by Jefferson of "company unions."

Witness Poole testified at R. 364 as follows:

"Q. (By Mr. Gould): Did you hear Mr. Jefferson say anything about the employees forming their own committee to handle their affair? A. No, I don't believe that he did say anything about it on that occasion at all. I don't think he did.

Q. Did he say anything about that on any other occasion that you know of? A. No, not that I know of.

Q. Did he say anything about the employees forming a group? A. I don't recollect that he did say anything about that at all.

Q. Did you hear Mr. Jefferson say anything about the formation of a company union? A. No. No, sir."

Witness Lancaster testified at R. 378 as follows:

"Trial Examiner Bennett: You were asked if he said something about company unions.

The Witness: Oh, company unions? No, sir.

Q. (By Mr. Berger): Don't recall him saying anything about a company union? A. No, sir.

Q. You are quite certain of that? A. Yes, sir.

Q. Is it possible that he may have said something about a company union and you don't recall it?

* * * * * * * *

The Witness: Well, I don't hardly think so, sir, for the simple reason that I hadn't been at the plant very long myself and I was kind of interested in what was going on with this election coming up. It was all news to me and I was very much interested, and if he said it, anything about a company union, why, I sure didn't hear it, but I was standing right next to him."

Witness Plano testified at R. 396-397 as follows:

"Q. And tell us as much of what Mr. Jefferson said as you can recall. A. Well, about as much as I can recall is what the other ones told.

Q. What other ones are you talking about? A. Lancaster and Poole.

Q. Were you present this morning when they testified about the meeting? A. Yes, sir.

Q. Was there anything that they testified to that you disagree with? A. No.

Q. In connection with what Mr. Jefferson said at this meeting? A. No.

Q. Did Mr. Jefferson say anything about a company union at this meeting? A. No.

Q. Did he say anything about a company union at any other plant? A. No."

In disbelieving witnesses Poole, Lancaster and Plano and crediting the testimony of Kimball and Vanderslice, the Board said at R. 217:

"Findings herein are based upon the testimony of Kimball, heretofore credited. Edward Vanderslice, still in Respondents' employ, testified under subpoena and substantially corroborated Kimball. Employees Poole and Lancaster testified for Respondents that they were present at this talk; that they heard no reference to the formation of a company union; *but*

> *that they did not pay much attention to the talk and recalled only parts of it.* Foreman Plano adopted the testimony of Poole and Lancaster as his version of the talk. The undersigned believes and finds that the testimony of Kimball, a clear and forthright witness, supported by that of Vanderslice, is the more reliable and it has therefore been credited herein as elsewhere." (Emphasis added.)

As pointed out previously in this Brief, Kimball was the leading supporter of the union in the plant and his testimony should have been weighed accordingly. Vanderslice testified at R. 354 that he couldn't remember much of what was said by Mr. Jefferson with regard to company unions.

Witness Lancaster was disbelieved by the Board because the Board said he "did not pay much attention to the talk and recalled only parts of it." [R. 217.] This statement is completely erroneous. The Board did not read the record carefully as Lancaster made no such remarks. At R. 374, under cross-examination, Lancaster was asked if he paid attention to everything Mr. Jefferson had to say and his answer was: "Well, I was standing practically next to him. I couldn't help but hear practically everything he said." At R. 378, under cross-examination, Lancaster was asked if it was possible that Jefferson may have said something about a company union and that Lancaster didn't recall it. Lancaster answered:

> ". . . I was very much interested, and if he said it, anything about a company union, why, I sure didn't hear it, but I was standing right next to him."

At R. 379 Lancaster testified:

> "I listened to everything that was said. I recall the high spots of his conversation that morning."

This is testimony of a witness which the Hearing Examiner and the Board disbelieved because "he didn't pay much attention to the talk and recalled only parts of it."

It is highly significant that the Board attorney did not question Jefferson during a lengthy examination about this speech wherein he is alleged to have instigated the formation of a company union.

In 1950 this Court handed down a significant decision on the scope of judicial review of administrative decisions. In *Universal Camera Corporation v. N.L.R.B.*, 340 U. S. 474, 95 L. Ed. 456, this Court held that reviewing courts must now assume more responsibility for the reasonableness and fairness of decisions of the National Labor Relations Board than reviewing courts have shown in the past. Specifically, this Court held that in determining whether an order of the Board is supported by substantial evidence, the reviewing court should take into account whatever in the record fairly detracts from the weight of the evidence and the reviewing court is precluded from sustaining an order merely on the basis of evidence which in and of itself justifies it without taking into account contrary evidence or evidence from which conflicting inferences could be drawn. This Court must weigh the evidence, and, we submit that in so doing, will find that substantial evidence on the record considered as a whole does not support the Board's finding that Petitioners instigated the formation of a company union. For the reasons set forth above, the order on this point should be denied enforcement.

IV.

Petitioners' Statements With Regard to Company Unions Were Expressions of Opinion Protected by the Free Speech Guaranty of the Act.

Under the original National Labor Relations Act employers were not permitted to state their preference for a particular union or for no union at all. Such statements, however, are now privileged under the free speech guaranty of the amended Act, provided, they do not carry a threat or promise of benefit. Standing alone, an employer-suggestion that employees form an independent or company union is protected under the free speech privilege. However, coercion, threat or promise of benefit accompanying such a statement removes it from the protection of the Act.

In *N.L.R.B. v. O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445 (1949), the Ninth Circuit Court held that expressions of preference for or against a union in general, and certain unions in particular, are protected under the free speech guarantee of Section 8 of the Act, so long as such expressions do not contain threats or promises of benefit. Accord, *L. Grief & Bro., Inc. v. N.L.R.B.*, 108 F. 2d 551.

In *Wayside Press, Inc. v N.L.R.B.*, 206 F. 2d 862, the Ninth Circuit Court again held that an employer's affirmative urging of his employees to exercise their rights under the Act to organize an independent union is not a violation of the Act. Nevertheless, in this case the Ninth Circuit Court holds Petitioners guilty of an unfair labor practice for doing nothing more than stating that in their opinion company unions worked out satisfactorily.

The primary purpose of Section 8(c) of the amended Act was to eliminate the practice which the Board had of using speeches and publications of employers concerning labor organizations as evidence, no matter how irrelevant or immaterial, that some other act of the employer had an illegal purpose. For example, if an employer criticized a union, and later a foreman discharged the union official for misconduct, the Board often said that the union official's misconduct warranted his being discharged, but would "infer" from what the employer said on other occasions that the discharge was for union activity and reinstate the official with back pay. Thus, the purpose of the Act is to protect the right of free speech when what the employer says is not, by its own terms, of a threatening nature or does not promise benefits. (See Sen. Rep. 105, 80th Cong., pp. 23, 24; House Rep. 245, 80th Cong., p. 33; Conference Rep., House Rep. 510, 80th Cong., p. 45.)

The effect of Section 8(c) has been to abolish the Board's totality-of-conduct theory, whereby statements which were not coercive *per se* were held to be unfair when they were part of a pattern adding up to discrimination and coercion. The Board itself has stated that under Section 8(c), "A non-coercive speech can no longer be held to violate the Act because at other times, and on other occasions, the employer has committed other unfair labor practices." (13th Ann. Rep. of the N.L.R.B. p. 49.)

In a very recent decision the newly constituted National Labor Relations Board holds that the acts of employers

must be *per se* violative of the free speech provisions of the Act and that the Board will not hold employers on the theory of guilt by context. *National Furniture Manufacturing Co.*, 106 N. L. R. B. 228.

In *Hinde and Dauch Paper Company*, 78 N. L. R. B. 488, pre-election statements by a supervisor to employees that the employees were already receiving all that the union was seeking in their behalf; *that if the employees desired to join a union, they should join a different affiliated union or company union;* that the union was the cause of wartime strikes resulting in shortages of materials and food overseas; that the union was in bad with the company; that the union could obtain nothing for the employees unless the employer agreed thereto; and that the employees should vote against the union and not believe what the union was telling them, were held to be privileged under Section 8(c) of the Act, since they contained no threats or promise of benefit.

Nowhere in any of the statements by Jefferson in which he is alleged to have commented favorably upon company unions is there any threat or promise of benefit. They were simply an expression of opinion by Jefferson that his experience with company unions in other plants had shown that they were satisfactory. We submit, that under the law Petitioners, if they so desire, could have pointedly told their employees that they preferred a company union to an outside union, so long as there was no threat or promise of benefit accompanying the expression of preference.

The contention of the Board that Petitioners *instigated* the formation of the company union can hardly be supported. The testimony is that before Jefferson ever made his alleged statements in which he commented favorably on company unions that some of the employees were active in forming their own union. There isn't one bit of evidence which would support the view that Petitioners had anything to do with this activity of the employees which occurred prior to Jefferson's statements. Witness Vanderslice testified at R. 357 that Ed Shimbroot, an employee, suggested the idea of forming a company union among the employees. He further testified that this activity on the part of Shimbroot occurred prior to any statement made by Jefferson [R. 357]. There is no evidence in the record that Petitioners had anything to do with Shimbroot's activities. At most, the record shows simply that Petitioners expressed a preference for a company union after one remark made by Shimbroot. This Petitions were privileged to do under the Act. There is no evidence whatever that any union, company or otherwise, was formed by the employees, or any action whatever taken, in response to any statements of Petitioners, or of employee Shimbroot.

For the reasons set forth above, we respectfully submit that the statements of Petitioner Anderson and Jefferson are protected expressions of preference for one form of union organization over another, which contain no threat of reprisal or promise of benefit, and, therefore, this part of the Board's order should be denied endorsement.

V.

Substantial Evidence on the Record Considered as a Whole Does Not Support the Board's Finding That Petitioners Falsely Attributed Responsibility to the Union for the Withholding of Bonus Payments From Employees and That Petitioners Falsely Accused the Union of Trying to Cheat the Employees of Their Withheld Bonuses.

Petitioners' incentive system and bonus arrangement played an important role in the instant proceedings. The operation of the incentive system is set forth in the intermediate report at R. 204-205. Petitioners' bonus system became the basis for a battle of words between Petitioners and the union as set forth in various bulletins and circulars issued by Petitioners and the union.

In November 1950, the union began its organizing campaign by bombarding the employees with handbills. In its first bulletin it raised the issue of the bonus [R. 156]. In its next bulletin the union accused Petitioners of stalling the election and intimated that the reason for this was that "the company is hoping that wages will be frozen before the union comes in." [R. 160.] The next bulletin accused Petitioners of "fooling," "duping," and "misleading" the employees [R. 161]. The fourth bulletin referred to Petitioners' bulletins as "libelous lies and hogwash" and a "low type of trash." [R. 165.] In a subsequent bulletin, the union accused Petitioners of insulting the intelligence of their employees, and of lying. [R. 172.] The union invited Petitioners to answer their circulars [R. 165]. Petitioners responded to the union propaganda

and in so doing the Board stated that "much of the content of the bulletins issued by Petitioners during the pre-election period is found to constitute an invasion of the rights of its employees." [R. 218.] Petitioners vigorously except to the Board's finding that the statements of Petitioners in the bulletins are false and are "parcels of an illegal promise of a benefit." [R. 219.] The contents of Petitioners' bulletins on the bonus issue are set forth in the Intermediate Report at R. 206-209. Petitioners' Exhibits 1, 3 and 7 set forth the union's propaganda in relation to the bonus. [R. 156, 161, 172.]

The bonus arrangement is explained in detail by Petitioner Anderson at R. 403-407. At R. 407-412, Petitioner Anderson explains the basis for his opinion that the union was responsible for the withholding of the bonus payments. Petitioner Anderson testified that an employee named Lorenz, at the instigation of the union, filed a claim with the California Labor Commissioner claiming a pro-rated share in the bonus. Four ex-employees joined Lorenz in his claim. The organizer for the union in the plant, one Welch, appeared for and represented these ex-employees. The union-sponsored claims by these ex-employees led to a lawsuit to determine the question of the right of the ex-employees to share in the bonus. Due to the activities of the union organizer Welch, that part of the bonus which was in issue was set aside in a special bank account pending the outcome of the lawsuit, and could not be distributed by Petitioners to their employees. [Witness Jefferson corroborated Petitioner Anderson's testimony in answer to the same questions at R. 248-255, 268-269.]

By raising the issue regarding the right of ex-employees to share in the bonus and by representing these

ex-employees before the State Labor Commission which filed suit on this issue, the union was responsible for the fact that the employees did not receive the full amount of their bonus as contemplated under the bonus plan. It is likewise a fact that Petitioners contended before the State Labor Commission that the ex-employees had no claim and that to permit ex-employees to share in the fund would be contrary to the terms of the plan as well as the reason therefor. [R. 182.]

It is clear that if the union's claim regarding the bonus prevailed, the funds available to presently employed employees would be substantially reduced. Such reduction would be the direct result of the union-sponsored claim. Because Petitioners resisted the claim and informed their employees about that fact, and assured them that it would make every effort to see that the employees got the money that was due them, a majority of the Board finds that Petitioners made false statements and were making an illegal promise of benefit.

It is manifest that it was the activities of the union organizer Welch which forced Petitioners to set aside the contested part of the bonus fund. It is manifest that the activities of Welch were responsible for this sum not being paid to the employees as provided for in the plan. It is manifest that it is not an illegal promise of benefit for Petitioners to state to their employees their position on the bonus issue. Petitioners, therefore, informed the employees that "Herbert Welch, union organizer, has taken steps that are apt to hold up part of the Christmas bonus. Welch has caused several employees who have severed their employment to file criminal charges against the management for failure to pay the bonus. . . . We are making every effort to get an early decision from the

State Labor Department so that you will have all of your bonus before Christmas." [R. 25.] Petitioners further stated that "because of the activies of the C.I.O. Rubber Workers' Union, it (the bonus) will be about one-fourth less. The union is demanding of the State that it make us pay the one-fourth that is being held back on you to the employees who quit their jobs before the bonus is distributed. You earned your bonus by staying on the team that produced the goods. We are opposing the union in their unfair attitude in taking money away from us, and giving it to those who have not helped to earn it. . . . We have deposited in a special bank account the money that the union is demanding. We are taking the position that it belongs to you." [R. 188.] Other bulletins of Petitioners were to the same point.

The Board finds that by making these statements, Petitioners *falsely* attributed responsibility to the union for the withholding of the bonus, and *falsely* accused the union of trying to cheat the employees of their bonus. At the trial the Examiner ruled that the parties would not be permitted to go into the merits or the validity of the respective position of the parties on the bonus issue. At R. 249, the Trial Examiner asked the Board attorney if it was necessary to get into the actual merits or the validity of what came before the California Division of Labor Law Enforcement in regard to the bonus and the Board attorney replied, "I am not going into the merits of the case." Notwithstanding this, the Board has now found that the statement of Petitioners' position on the bonus issue and their statement that the union was responsible for withholding the bonus are *false*. It was error for the Board to so find, and the Board's order on this point should be denied enforcement.

VI.

Petitioners' Statements Attributing Responsibility to the Union for the Withholding of Bonus Payments to Employees Were Expressions of Opinion Protected by the Free Speech Guarantee of the Act.

The Board has found that Petitioners *falsely* attributed responsibility for the withheld bonus to the union and *falsely* accused the union of trying to cheat the employees of their withheld bonus. In making such findings the Board was in error. The right of free speech does not depend upon the accuracy of the ideas expressed. In *N.L.R.B. v. J. L. Brandeis & Sons,* 145 F. 2d 556, 566, *supra,* the Circuit Court states:

> "Certainly, effectiveness of statement is not a test of its constitutionality; neither is accuracy of the view expressed. (Citing case.) One may descend to vilification, false statement or exaggeration and still be protected in his right of free speech. (Citing case.) As said by the Supreme Court in Thornhill v. Alabama, *supra,* 'The safe-guarding of these rights to the end that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government.' "

The *Brandeis* case, *supra,* quotes extensively and with approval from the case of *N.L.R.B. v. Brown-Brockmeyer Company,* 143 F. 2d 537. In the *Brown-Brockmeyer* case, *supra,* the Board found that a statement in an employers' letter, to the effect that the CIO was responsible for rescission of a State permit for women to work overtime, was an unfair labor practice. This finding was held to be erroneous by the Circuit Court as having

no support in the record. At page 541, the Circuit Court stated:

> "Nor was it an unfair labor practice for the respondent to state in its letter of September 15, 1942, that the C.I.O. was responsible for the rescission of the permit for women to work overtime. The respondent's letter dealt with the facts of the controversy, and therefore fell 'within that area of free discussion that is guaranteed by the Constitution.' Thornhill v. Alabama, 310 U. S. 88, 102, 60 S. Ct. 736, 744, 84 L. Ed. 1093."

At page 542 the Court in the *Brown-Brockmeyer* case, *supra,* said:

> "Respondent was justified in concluding that the protest came from the Union, and that it had a direct relation to the refusal. It therefore had a right to say so." (Citing numerous cases.)
>
> "We think this conclusion is required by the cited cases, even if respondent was mistaken in its belief that the C.I.O. was responsible for withdrawal of the privilege. The right of free speech does not depend upon the accuracy of the ideas expressed. If respondent honestly ascribed the loss of privilege to the protest of the Union, it was entitled to express that belief, and no testimony in this record sustains the finding that respondent's statement in the letter of September 15th was not honestly made."

We invite the Board to point to any evidence in the record which would sustain a finding that Petitioners' statements were not honestly made. It is clear from the record that Petitioners sincerely believed every statement they made to be true.

Board Member Murdock dissented from the holding of the two member majority on the bonus statements. Board Member Murdock said in dissent that although the statements of Petitioners were slanted to show the union in an unfavorable light, it is clear that the union made the bonus plan an issue in its campaign to organize Petitioners' employees and union organizer Welch did in fact actively assist several former employees in their attempt to secure part of the bonus. Board Member Murdock held that these statements were "obvious campaign propaganda, the truth or falsity of which the Board will not police." He rejected the position taken by the majority that, as a matter of law, these statements constituted promises of a benefit.

Petitioners respectfully submit that the Board erred in finding that Petitioners *falsely* attributed responsibility for the withholding of bonus payments to the union and *falsely* accused the union of trying to cheat the employees of their withheld bonus. The statements of Petitioners upon which these findings are based are protected by the free speech guarantee of the Act. The right of free speech does not depend upon the accuracy of the ideas expressed. The statements were part of campaign propaganda, which the Board does not police. They did not constitute an illegal promise of benefit. They dealt with the facts of the controversy. Finally, there is no testimony in this record that Petitioners' statements were not honestly made. This Honorable Court should deny enforcement of this part of the Board's order.

VII.

Substantial Evidence on the Record Considered as a Whole Does Not Support the Board's Finding That Petitioners Interrogated an Employee Concerning His Vote in a Board-conducted Election.

The Trial Examiner and the Board found that Petitioners' labor relations consultant, Jefferson, unlawfully interrogated employee Kimball in connection with his vote at the pending election. The testimony of Kimball, an admittedly strong and active supporter of the union [R. 306-307], is found at R. 300 as follows:

> "Q. Do you recall having a conversation with Mr. Jefferson concerning the union vote which took place at your bench? A. Yes. Mr. Jefferson came to my bench a day or possibly two days or three days before the election, and he came up to me and asked me how things were going. I told him, 'Fine.'
>
> He said, 'How are you going to vote?'
>
> I said, 'Well, as I understand it, that is a secret,' and I didn't wish to state one way or another.
>
> * * * * * * * *
>
> *Then he went on to state that regardless of how the elections came out, that I would still have a job there."* (Emphasis added.)

Witness Kimball placed the time of the conversation with Jefferson as between 7:15 and 8:00 o'clock in the morning [R. 315].

This is the only testimony in the entire record which supports the Board's finding that Petitioners unlawfully interrogated an employee concerning his vote.

The Intermediate Report of the Trial Examiner, which was adopted by the Board, deals with this point in the following manner at R. 216:

> "In a talk with employee Harold Kimball immediately before the election, while the latter was at work in the pressroom, Jefferson asked Kimball how he intended to vote; Kimball replied that this was a secret. Testimony by several coworkers of Kimball that they did not observe the two men in conversation in the pressroom does not rebut Kimball's impressive testimony which the undersigned credits in full."

In considering the record as a whole, we have the testimony of three other employees who worked next to Kimball and who testified that at no time did they ever see Jefferson talk to Kimball at his bench in the plant.

Witness Poole testified that he could see Kimball's work bench from where he worked and that he didn't at any time see Mr. Jefferson talk to Mr. Kimball alone [R. 364-366].

Witness Lancaster testified at R. 373 as follows:

> "Q. Did you ever see Mr. Jefferson stop at the machine where Mr. Kimball was working? A. No, sir.
>
> Q. Did you ever see Mr. Jefferson talking to Mr. Kimball? A. No, sir.
>
> Q. Did you ever hear Mr. Jefferson and Mr. Kimball talking? A. No."

On cross-examination by the Board attorney, witness Lancaster testified as follows at R. 381:

> "Q. It is possible, is it not, that Mr. Jefferson could have a conversation with Mr. Kimball in the

pressroom and you might not even notice it? A. Well, if he did, it would not be in the pressroom, for the simple reason I would observe Mr. Jefferson coming into the pressroom.

Q. Well, Mr. Jefferson could come to the pressroom and talk to any one of the 13 pressmen, could he not? A. He could, but if he did I am right in front where I would observe him coming in.

Trial Examiner Bennett: Does Mr. Jefferson come into the pressroom?

The Witness: I haven't seen him outside of that one morning.

Trial Examiner Bennett: Outside of which morning?

The Witness: That morning when we had that meeting in the pressroom."

Witness Plano, who was foreman of the shift on which witness Kimball worked, testified at R. 397 as follows:

"Q. Now, in what part of the press department are you located during the shift? A. I am all over.

Q. Have you seen Mr. Jefferson in your department on any other occasion than when this meeting was held to which you referred? A. No.

Trial Examiner Bennett: You have never seen him in that department?

The Witness: No, he has never come down that early in the morning.

Trial Examiner Bennett: Well, at any time.

The Witness: I am not there during the day.

Trial Examiner Bennett: Oh, I see.

Q. (By Mr. Gould): Did you see Mr. Jefferson talk to Mr. Kimball? A. No."

Petitioner Anderson testified that he never instructed Mr. Jefferson, or anyone else, to question any employees

about how they were going to vote at the election [R. 430].

Again, a significant fact to weigh, in considering the record as a whole, is the fact that the Board attorney failed to examine Jefferson as to whether or not he ever made the statements which witness Kimball attributed to him.

Since the Board failed to interrogate Jefferson on this issue, Petitioners planned to call Jefferson as their witness when they put on their case. However, witness Jefferson was very ill at the time he was to testify and, though the Examiner allowed Petitioners a one-day continuance because of Jefferson's illness, he was still too ill to testify [R. 462-464]. For this reason, we do not have the testimony of Jefferson as to the alleged conversation with Kimball. The burden is not on Petitioners, however, to prove that Petitioners *did not* interrogate their employees about their vote. The burden is on the Board to prove that they did. Jefferson was called as a witness by the Board, yet not examined on this point. Apparently, the General Counsel and the Board are concerned with this Court's decision in the *Universal Camera* case, *supra,* and are now more interested in making a record, than getting at the truth.

Considering the bias of Kimball, the leading supporter of the union in the plant [R. 202], and comparing the testimony of three of Kimball's disinterested co-workers that they at no time ever observed Jefferson talking to Kimball at his work-bench, and that Jefferson had never at any time come into the pressroom except on one occasion when a meeting was held at which all of the employees were present, Petitioners submit that the Board's finding that Petitioners unlawfully interrogated an em-

ployee about his vote is not supported by substantial evidence on the record considered as a whole and the order in this regard should be denied enforcement.

VIII.

Assuming That Substantial Evidence on the Record Considered as a Whole Supports the Board's Finding That Petitioners Interrogated an Employee About His Vote, Nevertheless, Such Interrogation Is Protected by the Free Speech Guaranty of the Act.

Section 8(c) of the Taft-Hartley Act was specifically intended to prevent the Board from using unrelated noncoercive statements on union matters as evidence of a general course of unfair labor conduct. The substance of the legislative history of Section 8(c) of the Act is found in House Report No. 245, page 33, in the following language:

> "Although the Labor Board says that it does not limit free speech, its decisions show that it uses against people what the Constitution says they can say freely. . . . The bill corrects this, providing that nothing that anyone says shall constitute or be evidence of an unfair labor practice, unless it, by its own express terms, threatens force or economic reprisal. *This means that a statement may not be used against the person making it unless it, standing alone, is unfair within the express terms of sections 7 and 8 of the amended act.*" (Emphasis added.)

In *N.L.R.B. v. Montgomery Ward & Co.*, 192 F. 2d 160, 163 (1951), the court says:

> "But inquiries made by the manager concerning what was being done in behalf of the union, and

> statements as to his not liking the union, to the extent that they constituted no threat or intimidation, or promise of favor or benefit in return for resistance to the union, were not unlawful, particularly after the 1947 amendment of the Act found in section 8(c)."

In *N.L.R.B. v. Arthur Winer, Inc.,* 194 F. 2d 370 (1952), the court holds that mere words of interrogation with regard to union activity and as to "how the girls felt about the union," which are not threatening or intimidating *in themselves,* cannot support a finding of restraint and coercion of employees in violation of Section 8(a)(1) of the Act.

The record is conclusive that Petitioners made no threat or promise of benefit in connection with the alleged interrogation of witness Kimball. In fact, witness Kimball testified that Jefferson, after interrogating him about his vote, stated:

> ". . . that regardless of how the election came out, that I [Kimball] would still have a job there." [R. 301.]

Witness Kimball also testified at R. 307 that at no time did anyone representing Petitioners question him regarding his activity in behalf of the union.

Assuming that the finding that Petitioners interrogated an employee concerning his vote is supported by substantial evidence on the record considered as a whole, still such questioning is protected under the free speech guarantee of the Act, since "standing alone" and "by its own express terms" it does not threaten force, economic reprisal or promise of benefit.

IX.

Substantial Evidence on the Record Considered as a Whole Does Not Support the Board's Finding That Petitioners Threatened to Close Their Plant Before They Would Recognize the Union.

The Board produced one disgruntled ex-employee, Sawyer, who had left Petitioners' employ in a huff [R. 328, 329] to take the stand and testify that Petitioner Anderson said he would "close his doors" before he would do business with the union [R. 320]. The testimony of Sawyer [R. 320] "that he [Petitioner Anderson] would rather close his doors than have a union in there" is the only evidence in the entire record attributing such a statement to Petitioners. Petitioner Anderson is reputed to have made this statement in an address to a large number of employees. Due to the great number of potential witnesses available, it is strange and suspicious that witnesses more reliable than a disgruntled employee with an admitted grudge were not produced by the Board. Witness Moses was called to testify concerning the alleged speech and did not attribute such a remark to Petitioner [R. 385]. Board witness Kasel was present at the time the statement was alleged to have been made [R. 331], yet it is significant that the General Counsel did not question her as to whether or not the statement was made. Witnesses Poole and Lancaster testified they never heard Petitioner say he would close the doors of the plant before he would deal with the union [R. 364, 373]. Petitioner denied that he ever made such a statement [R. 429]. The record reveals that Petitioners have had much

to do in recent years with the Board's processes. Petitioner Anderson would not, therefore, be so naive as to make such a statement as witness Sawyer attributed to him. As Petitioner stated: "it would be very foolish of me" to make such a statement [R. 429]. It is highly significant that during the entire cross-examination of Petitioner Anderson by the Board, the Board did not see fit to cross-examine Anderson on this point and seek to ascertain the truth by the most effective means available —cross-examination. We submit that the Trial Examiner and the Board should have required more convincing proof of this allegation.

In considering the record as a whole on this point, as this Honorable Court must do under the doctrine of the *Universal Camera* case, *supra,* we find in support of the Boaord's finding, the statement of witness Sawyer. On the other hand, we have a record which shows the obvious bias of this witness, the failure of two other witnesses who were present to attribute the "close the door" canard to Petitioner, two witnesses who testified they never heard Petitioner make such a statement, the emphatic denial of Petitioner Anderson, Petitioner Anderson's realization that because of his prior knowledge of Board processes that it would be foolish to make such a statement, plus the suspicious failure of the Board's attorney to cross-examine Petitioner Anderson on this point. These factors make the Board's order subject to the objection that it is not supported by substantial evidence on the record considered as a whole and it should be denied enforcement.

X.

Petitioners' Prediction That the National Labor Relations Board Would Make an Order Eliminating a Prior Wage Increase Was an Expression of Opinion Protected by the Free Speech Guaranty of the Act.

The Board found that Petitioners "falsely attributed to the National Labor Relations Board an order reducing wages or eliminating a prior wage increase if the employees vote in a Board-conducted election in favor of the union." General Counsel's Exhibit 5 contains the statement which the Board finds to be unlawful [R. 28]. It is clear from a reading of the statement that Petitioners were making a prediction as to what LeBaron, the Board's Regional Director, may do in the future. When asked to explain the basis for this opinion, Jefferson testified at R. 262 as follows:

> "A. It was my theory he should do that, if he held the increase invalid, that is one of the reasons why the election was set aside. And it inferred there was a bribe there of the employees. And, certainly, it would have been common justice not to recognize bribery, and, at least, condone it. It was my thought he should order it set aside, but I am not making his opinions for him. I just, again, expressed my opinion."

What Jefferson meant was this: When the union lost the election, the Board held the wage increase to be illegal and set the election aside; in substance, the Board held that Petitioners had bribed the employees; bribery should not be condoned, therefore the Board should order a restitution of the monies and set aside the wage increase; this would be true whether or not the union wins the second election.

That this was an honest and sincere belief of Petitioners is readily apparent from an examination of Petitioners' exceptions to the Regional Directors' order setting aside the first election and ordering the second election. [General Counsel's Ex. 13; R. 56.] In their exceptions, Petitioners said:

> "If the Board holds with the Regional Director in this twisted ruling, the Employer submits that it is obligatory on the Board to officially order a restitution of the moneys paid and a cancellation of the increase in pay and subsequent increases."

Jefferson was questioned on General Counsel's Exhibit 13 in the following manner at R. 281:

> "Q. (By Mr. Berger): Directing your attention to the last paragraph contained in these exceptions, would you tell us what you meant by that last paragraph, 'If the Board'—et cetera? A. It was my opinion that if the election were set aside that it would quite naturally infer that the increase in wages was in the nature of a bribe to the employees, to get them to vote whatever way was assumed to be the right way."

At R. 282, 283, Jefferson testified that in General Counsel's Exhibit 5 [R. 28] Petitioners were communicating to the employees what they communicated to the Board in General Counsel's Exhibit 13 [R. 56]. Jefferson further testified that the critical paragraphs in both exhibits were expressions of his opinion as to the action which the Board would, and should, take. At page 17 of its Brief, the Board states:

> "Respondents' assertion that the Board would rescind a prior wage increase is equally baseless. As the Board noted, such action is 'completely contrary

to customary Board policy' [R. 220] and Respondents' threat in this regard is plainly an unfair labor practice."

We are unable to find anywhere in the record evidence which will support the statement of the Trial Examiner that such action is completely contrary to customary Board policy. In any event, we submit that whether or not such action is contrary to Board policy is wholly immaterial. Petitioners' statement of opinion that action by the Board would result in a loss of wages is no more illegal than Petitioners' statement of opinion that bringing a union into the plant would result in a loss of wages; and it is clearly the law that an employer may state to his employees, as his opinion, that unionization will result in a loss of wages or employment. (See *Mylan-Sparta Company, Inc.*, 78 N.L.R.B. 1144, *supra*). Such a prophecy or prediction by the Petitioners is not a threat, says the Board, so long as Petitioners do not express or imply that *Petitioners* will use their economic power to make the prophecy or prediction come true.

Further, as set forth above herein, the right of free speech does not depend upon the accuracy of the ideas expressed. Even if Petitioners were mistaken in their belief that the Board would make such an order, if Petitioners honestly believed that the Board should, and would, make such an order, it was entitled to express the belief, and there is no testimony in this record that Petitioners' statements were not honestly made. To the contrary, General Counsel's Exhibit 13 [R. 56] is persuasive evidence that Petitioners were sincere in making such a statement. For the reasons set forth herein, we respectfully submit that this Honorable Court should deny enforcement of this part of the Board's order.

XI.

Substantial Evidence on the Record Considered as a Whole Does Not Support the Board's Finding That Petitioners Promised Better Treatment and Wage Increases in Return for Anti-union Votes.

The Board found, under this point, that Petitioners had (1) unlawfully accused an employee of being the leader of the union in the plan and coupled this accusation with the promise of a wage increase for all employees if the union was defeated in the election; (2) unlawfully told another employee that if the union lost the election the employees would receive better treatment from management; (3) unlawfully promised the employees a plant-wide wage increase on the day before the election. We respectfully submit that the testimony upon which the Board's findings are based do not constitute an unlawful promise of benefit.

Witness Kasel at R. 467 testified that Jefferson told her "Mr. Anderson and him knew I was the instigator of the union out there." At R. 468, witness Kasel testified that Jefferson said something about "if the union didn't come in, we would get a raise."

Witness Sawyer testified, on direct examination, at R. 323 that Jefferson "spoke about how the company had tried to be so fair with the employees, and he expected the employees to cooperate with the company, and how well Mr. Anderson had used us, and that is all I remember right now." At R. 324, Sawyer testified that Jefferson said: "That before we left work that night we would all get a surprise, that he would rather not say what it was, he would rather keep it a surprise."

On cross-examination, witness Sawyer testified as follows:

"Trial Examiner Bennett: Coming back to this question that he asked you if you were for or against the union, what reply, if any, did you make?

The Witness: He didn't ask me that directly.

Trial Examiner Bennett: What do you mean?

The Witness: He went on telling about what the company had done and what they would do and how the union didn't want overtime. He asked if I approved of overtime. He said to bear in mind how well the company used us and that they would use us even better if they won out in the election.

Q. (By Mr. Gould): What words did he use? A. I don't remember the exact wording."

The Board finds that Petitioners accused Kasel of being the leader of the union in the plant. The record does not support this construction of the testimony. So far as appears from the record, Jefferson simply stated, as a fact, without threat or promise, that Petitioners were aware that she was one of the leaders of the union in the plant. There is nothing illegal under the Act in making such a statement to an employee.

Witness Kasel's testimony is vague and uncertain as to what was said by Jefferson. In one place Kasel testified Jefferson "said something about if the union didn't come in, we would get a raise," and in another she testified that she didn't know exactly what he said but what he meant was if the union didn't come in we would get a raise. [R. 472.]

It is readily apparent, of course, that witness Sawyer's testimony that the Petitioners would "use us even better if they won out in the election" was an after-thought, for, on direct examination, she testified at R. 324 simply that Jefferson told us "how well Mr. Anderson had used us, and that is all I remember right now." Nothing was said about "using us even better if they won the election." As pointed out previously in this Brief, witness Sawyer's testimony should be weighed with caution.

On the issue of the raise in pay granted to the employees just prior to the election, Petitioners respectfully submit that there is nothing illegal in the wage increase for the reason that: (1) it was granted for the purpose of protecting the employees against a wage freeze as indicated in the bulletin to the employees [R. 49]; (2) it was in accord with a long established practice and policy of the company.

There is nothing unlawful in granting employees a wage increase to avoid a pending wage freeze under the stabilization program. The record is clear that the booklet announcing the wage increase was prepared by Petitioners January 15, 1951, some two weeks before the wage freeze is alleged to have gone into effect. That Petitioner Anderson was unaware of any wage freeze at the time he issued the booklet and leaflet attached to the booklet [General Counsel's Exs. 8 and 9] is clear from a reading of his testimony at R. 421, where he testified:

> "If you will go into the exact date of the wage freeze, the explanation of it, the time the manufacturers received it, you will see that we did come out with our wage increase prior to any information being released from Washington, D. C."

The wage increase, as the record shows, merely conformed to long established practice in the plant. Petitioner Anderson's testimony relating to company wage policy appears at R. 38, 416-419, 444-445. It is uncontradicted that Petitioners have had a policy of reviewing their wage scale every six months and making readjustments in wages at the beginning of the year and in the middle of the year.

Petitioner Anderson testified that the only reason that the booklet was issued immediately prior to the election was because of the circumstance that it was not until three or four days prior to the election that he received the booklets from the printer [R. 439]. Again at R. 449 Petitioner Anderson testified that there was no reason why they were distributed when they were except for the fact that was when they were received from the printer. He testified that if he had received them two weeks after the election he would have distributed them then, or if he had received them six months prior to the election he would have distributed them on that date.

The issue on this phase of the wage increase is whether the appearance of a union on the scene and the contingency of an election require an employer to suspend a normal and long established practice and policy, the application of which at other times is lawful and proper. Petitioners respectfully submit that the pendency of an election does not require an employer to adopt new and different policies and practices.

The timing of the increase announcement, which the Board finds objectionable at page 15 of its Brief, is best described by the words of the Board in *United Screw and Bolt Corporation,* 91 N. L. R. B. 916, where the Board states that the relationship between the granting

of benefits and the election was mere temporal coincident.

The *United Screw and Bolt Corporation* case, *supra,* sets forth the circumstances under which a wage increase will invalidate an election: (1) No request by employees for the increase; (2) increase wholly unexpected; (3) announcement of benefit intentionally delayed to coincide with the election; (4) substantial departure from policy, custom, and practice in announcing the increase.

In the instant case the record shows that the increase was not unexpected; that the announcement of the benefit was not intentionally delayed to coincide with the election; that it was not a substantial departure from policy and practice. Witness Anderson testified that the booklet [General Counsel's Ex. 8] was seven or eight months in preparation [R. 415]. The booklet is dated January 15, 1951, and that is the date it was sent to the printer. It is obvious, therefore, that the wage rates which were set out at the back of the booklets must have been prepared prior to January 15, 1951, a considerable length of time before the election took place. The job classification rates were prepared by Mr. Anderson some time in the fall of 1950 [R. 450].

The leaflet which was attached to the booklet [General Counsel's Ex. 9] refers to the fact that if the company wins the election, the wage scale will go into effect February 26, 1951, otherwise it will not. Petitioner Anderson explained this by saying that, if the union won the election, the company could not give the employees any wage increase unilateraly, but would have to negotiate with the union and, in that event, the employees might have to wait six months or one year for the increase since it would be subject to wage stabilization regula-

tions. That is the same explanation which Petitioners set out in the booklet [R. 36].

It should be emphasized that Petitioners followed their offer of a wage increase in their booklet by saying:

> "We will not in any manner interfere with, restrain or coerce our employees in the exercise of their right to self-organize or to join or assist in the organization of any such." [R. 37.]

The leaflet and the booklet adequately explain to the employees that the proposed increase was made to protect them against a wage freeze; that it was also made clear to the employees that it was not made for the purpose of influencing their decision on the question of unionization for the reason that Petitioners followed up the proposed increase with the statement that the company would not in any manner interfere with the employees in their exercise of self-organization. The booklet and the leaflet [General Counsel's Exs. 8 and 9] were therefore just what they said they were, an announcement of a wage increase expected by the employees to avoid a wage freeze, and one to which they were entitled in accordance with the established policy of the company. It cannot be construed as a promise of benefit which was designed to induce anti-union votes.

The only valid objection to the wage increase which is worthy of consideration, as Petitioners see it, is the timing of the announcement. The timing of the announcement, we submit, is adequately explained by the uncontradicted testimony of Petitioner Anderson.

The granting of a wage increase may create a suspicion that benefits are being offered with the intent of inducing employees to reject the union, but suspicion and sur-

mise are not enough. In *W. C. Nabors Company,* 89 N. L. R. B. 538, 564, 565 (1948), where the employer granted a ten cents increase to 90% of the employees who had signed an anti-union petition, while 71% of the non-signers received only five cents, the Board held:

> "While such disproportionate treatment raises a strong suspicion that the signers of the petition were rewarded and non-signers thus put on notice that union adherence would prove costly, this increase followed a *previously established pattern,* of which no complaint can be offered." (Emphasis added.)

In *Gray Drug Stores, Inc.,* 79 N. L. R. B. 1140 (1948) individual employees were promised raises before an election. The Board held that the raises were proper as they were "given in accordance with the employer's regular wage policy."

In *Marr Knitting Company, Inc.,* 90 N. L. R. B. 479 (1950), an employer found his pay scale out of line with other plants, and, convinced of a disparity, granted a wage increase. The Board held that this was not done to coerce the employees.

In *Lerner Shops of Alabama,* 91 N. L. R. B. 151 (1950), the Board holds that bonuses and wage increases granted just prior to an election were proper since they accorded with the employer's customary policy.

Petitioners respectfully submit that substantial evidence on the record considered as a whole does not support the Board's finding that Petitioners promised better treatment in return for anti-union vote, and that the wage increase was proper since it was in accord with well established policy and was made to avoid a wage freeze. For these reasons, the Board's order should be denied enforcement.

Conclusion.

It is respectfully submitted that this Petition for Writ of Certiorari be granted and that the Court settle, with finality by its judgment, the uncertainty and conflict in the law which now exists.

Respectfully submitted,

CARL M. GOULD, for
HILL, FARRER & BURRILL,
Attorneys for Petitioners.

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